

*United States Court of Appeals
for the Second Circuit*



**APPELLEE'S REPLY
BRIEF**

16 - 6156

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

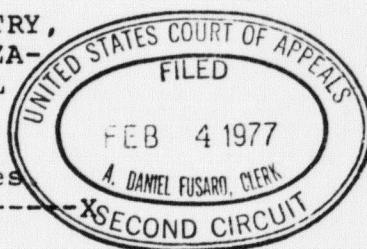
-----X
SAMUEL M. KAYNARD, REGIONAL DIRECTOR OF
REGION 29 OF THE NATIONAL LABOR RELATIONS
BOARD, FOR AND ON BEHALF OF THE NATIONAL
LABOR RELATIONS BOARD,

Petitioner-Appellant,

v.

JOINT INDUSTRY BOARD OF THE ELECTRICAL
INDUSTRY AND PENSION COMMITTEE, JOINT
INDUSTRY BOARD OF THE ELECTRICAL INDUSTRY,
AND TRUSTEES OF THE PENSION, HOSPITALIZA-
TION AND BENEFIT PLAN OF THE ELECTRICAL
INDUSTRY,

Respondents-Appellees



ON APPEAL FROM AN ORDER OF THE UNITED
STATES DISTRICT COURT FOR THE EASTERN
DISTRICT OF NEW YORK

SPECIAL RESPONSE BY
RESPONDENTS-APPELLEES

DONALD F. MENAGH
Attorney for Respondents-
Appellees
Office & P.O. Address:
130 East 40th Street
New York, New York 10016
(212) 532-3850

IRWIN GELLER,
of Counsel

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-X

SAMUEL M. KAYNARD, REGIONAL DIRECTOR OF
REGION 29 OF THE NATIONAL LABOR RELATIONS
BOARD, FOR AND ON BEHALF OF THE NATIONAL
LABOR RELATIONS BOARD,

Petitioner-Appellant,

v.

JOINT INDUSTRY BOARD OF THE ELECTRICAL
INDUSTRY AND PENSION COMMITTEE, JOINT
INDUSTRY BOARD OF THE ELECTRICAL INDUSTRY,
AND TRUSTEES OF THE PENSION, HOSPITALIZA-
TION AND BENEFIT PLAN OF THE ELECTRICAL
INDUSTRY,

Respondents-Appellees.

-X

SPECIAL RESPONSE BY
RESPONDENTS-APPELLEES

STATEMENT

This brief is served and filed pursuant to
permission granted in the Order of this Court dated
January 26, 1977 and is in response to various computa-
tions set forth in the reply brief of the Labor Board.

THE LABOR BOARD'S COMPUTATIONS ARE ERRONEOUS

The Labor Board, at p. 3 of its reply brief, claims that for fiscal 1976 expenditures for the Dental Department of the Pension Committee of the Joint Industry Board were running below expenditures for fiscal 1975. On this basis the Labor Board projects that operating the Department for a full year would cost less than \$800,000.

A correct statement, however, is that expenditures for the Dental Department were higher than for the previous year, and that the total annual cost was realistically projected as being \$1 million.

The Labor Board is wrong to base its projection on the Pension Committee's unofficial 6-month interim financial report (A. 566) and then to compare that projection with the official annual report prepared after an audit by certified public accountants. (A. 560) The record is replete with testimony and evidence that the interim reports are prepared on a cash basis and that losses are, of necessity, substantially understated. (See Respondents-Appellees' main answering brief, p. 2.) The accountants' report is prepared on an accrual basis and reflects the accurate picture.

Thus it happened that the accountants' report for fiscal 1975 disclosed that actual losses for the Welfare Account of the Pension Committee were \$1 million greater than had been reported unofficially. (Ibid)

Had the Labor Board compared "apples to apples" it would have compared the \$393,524 figure on the unofficial 6-month report for 1976 (A. 566) with the \$726,126 year-end unofficial figure

for 1975 (A. 548), and would then have seen that expenditures were increasing, not decreasing, even in the face of economy measures. To project the accurate annual loss for fiscal 1976, it then should have weighed the disparity between the official (A. 560) and unofficial figures for 1975 (A. 548), and considered that the unofficial expenditures for the Dental Department was understated by \$179,000 due to the difference in accounting methods.

Furthermore, reference to the fund balance in 1970 is meaningless. (Reply brief, p. 4) The fund balance jumped during that year by \$2.7 million; the reason for accumulating a fund balance was plainly not to deplete it in a fashion that the Pension Committee considers hazardous simply because the Labor Board obtained a virtually automatic statement by the lower court that there might be a reasonable basis for the Labor Board to proceed with its legal action. Additionally the Welfare Fund spent \$5.88 million in fiscal 1971 (S.A.1); it spent \$13.92 million in fiscal 1975. That should give some idea of rising costs and the differences in the benefit mix, and consequently of the unfairness of comparing fund balances in the two separate periods.

Finally the claim (reply brief, p. 3) that the Board will render its decision soon is at cross-purposes with the entire basis for seeking an injunction. In any event, the computation should be viewed as speculative in the extreme, in contrast to the reasonable apprehensions of the Pension Committee that any

injunction would entail a significant dollar drain from its already depleted reserves.

Respectfully submitted,

Donald F. Menagh
Donald F. Menagh

Counsel to Appellees,
JOINT INDUSTRY BOARD OF THE
ELECTRICAL INDUSTRY, et al.

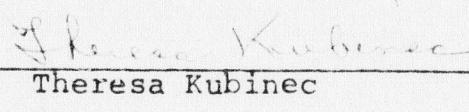
Irwin Geller,
of Counsel

AFFIDAVIT OF SERVICE

THERESA KUBINEC, the undersigned, being
duly sworn, deposes and says: On February 3, 1977
deponent served the within Special Response brief
by Respondents-Appellees upon:

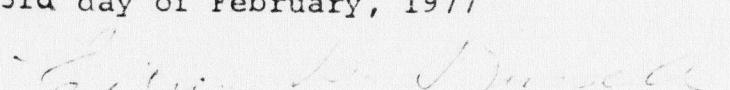
MILFORD R. LIMESAND, ESQ.
Deputy Assistant General Counsel
National Labor Relations Board
1717 Pennsylvania Ave., N.W.
Washington, D. C.

by depositing two true copies thereof in a post-
paid properly addressed wrapper in an official
depository under the exclusive care and custody of
the U. S. Postal Service within the State of New
York.



Theresa Kubinec

Sworn to before me this
3rd day of February, 1977



EILEEN B. RUSSELL
Notary Public, State of New York
No. 03-3405050
Qualified in Bronx County
Commission Expires March 30, 1977